

Questions Raised by CAIP Concerning the  
STAPPA and ALAPCO *Menu of Options* and  
STAPPA and ALAPCO Responses

Q: What was CAIP's purpose in writing this paper?

A: The paper was prepared "as an analysis for state and local permitting authorities to support adoption of EPA's new source review (NSR) reforms," according to William Lewis, Counsel for the Clean Air Implementation Project. The NSR "Reforms," particularly those relating to baseline figuring and applicability, had long been sought by CAIP's membership. The paper is an advocacy document.

Q: CAIP urges state and local agencies to adopt the reforms as promulgated by EPA and "make minor adjustments" later if necessary. What are the disadvantages to this approach?

A: Once SIPs are revised, they are the promulgated rules that govern all NSR permitting. CAIP states that minor adjustments could be made "later" perhaps in order to assure states that flexibility will still be possible. In reality, however, few state or local agencies have the time or personnel available to promulgate multiple NSR rules.

Q: Why does CAIP call the STAPPA/ALAPCO *Menu of Options* "unlawful, impractical or both?"

A: CAIP may anticipate that states and localities will be intimidated by the possibility of lawsuits into passing the federal rules without modifications. Nonetheless, under the Clean Air Act, states take the lead in SIP development processes within their jurisdictions. They are free to submit plans that expand upon or differ from federal law requirements. See, Reitze, Arnold, *Air Pollutions Control Law*, ELI 2001 at 55, and CAA section 116, 42 U.S.C. section 7416. EPA itself has noted that state and local jurisdictions have significant freedom to customize their NSR programs. See *Menu* at p-7, "Introduction."

Q: Is there justification for CAIP's statement that the baseline provision "approach" of STAPPA and ALAPCO "would be unlawful under the Clean Air Act?"

A: No. CAIP's statement is wrong. First, the *Menu* does not advocate any one approach. STAPPA and ALAPCO suggested in the *Menu* two options for baseline selection. Both options presumptively set baseline as the average emissions during the two calendar years immediately before the project. The first option, however, allows the source to select a different two-year period within the last five years that is more representative of normal operations, with approval of the permitting authority. The second option allows the source to select a baseline that is based on the source's utilization rate during the highest two years of production in the last five years, with permission of the permitting authority. See *Menu*, p. 14. Neither of these options is

“unlawful.” Both, however, differ from the federal rule, which Congress specifically permitted under the Clean Air Act.

Q: Is the baseline provision for the federal reforms more complex and difficult to enforce?

A: Yes. The NSR Reform regulation requires different baselines to be figured for each pollutant and for each emissions unit. Moreover, no records of the calculations or the emissions changes are required to be kept, resulting in greatly increased complexity and problematical enforceability. See *Menu* discussion, p. 43-45.

Q: CAIP’s “Key Features” section states that records are required to be kept even though the source determines that the project would not trigger NSR applicability. As a practical matter, are there more or fewer record-keeping requirements under the “NSR Reforms?”

A: Fewer. The December 2002 rule requires that sources keep records of proposed physical changes and emissions only if the source (without input or knowledge of the state or local agency) determines unilaterally that there is a “reasonable possibility” that the project will cause a significant emissions increase. In the words of the General Accounting Office, “...under the rule, companies will now determine whether there is a ‘reasonable possibility’ a facility change will increase emissions enough to trigger NSR—in effect policing themselves. But EPA has not defined “reasonable possibility,” required that companies keep data on all of their reasonable possibility determinations, or specified how the public can access the data companies do keep on site.” See “GAO Report on New Source Review,” October 2003.

Q: Are CAIP statements accurate regarding the “actual-to-potential” test in the *Menu of Options*?

A: No. The statements are misleading. CAIP states, “...STAPPA/ALAPCO does not appear to directly challenge the ‘actual-to-projected-actual’ test, [but] proposes as its principal improvement...the ‘actual to potential’ test...” CAIP is correct in part in that the *Menu* does not challenge the “actual-to-projected actual” test. In fact, two of the three *Menu* options presented are “actual-to-projected actual” tests. CAIP’s point concerning the *WEPCO* case is erroneous. States have no obligation to follow the case law of federal courts under the framework of the Clean Air Act. Rather, under section 116 of the Act, state legislatures are free to arrive at their own implementation plans as long as they are as stringent as those in the federal regulations. In doing so, states in the Seventh Circuit Court of Appeals may wish to take into account the reasoning of the *WEPCO* case, but they are not legally bound by it. If, therefore, Indiana, Illinois and Wisconsin were to choose the option of “actual to potential test for all sources,” the Clean Air Act would allow this applicability test in accord with section 116.

Q: Are the other cases cited by the CAIP paper deterrents to use of the *Menu*?

A: No. (See the above discussion). Industrial sources arguing that the holdings of *Duke Energy* and *Ohio Edison* are relevant to state SIP determinations are wrong.

States are free to legislate and regulate as they see fit. *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975). In fact, EPA has often endorsed the freedom of states to arrive at their own regulatory framework. With regard to NSR definitions, for example, EPA approved Pennsylvania's definition of "actual emissions" despite comments noting that the definition arguably conflicted with Pennsylvania's prohibition against regulations more stringent than those required by the federal Clean Air Act. EPA noted that the federal rules require only that the SIP must include procedures to determine whether construction and modification of any facility would result in either a violation of the control strategy or interfere with attainment or maintenance of a national standard in the state or a neighboring state. The agency concluded with approval that Pennsylvania's related definitions and NSR-related regulations, as a whole, are designed to be consistent with the tenets used in the design of the relevant and required attainment plans and their associated control strategies. 62 Fed.Reg.64722-64725. This functional approach places paramount importance on consistency with a state's attainment plan and control strategy as a whole and acknowledges the state's latitude to make choices in furtherance of its plan and strategy.

Q: Does the Menu of Options "conflict with the Clean Air Act," as stated by the CAIP paper?

A: No. The Menu is completely consistent with the Clean Air Act. CAIP, however, states that the Menu is in conflict because with regard to both baseline setting and applicability determinations, "the NSR program incorporates the definition of 'modification' of the NSPS program and must be reasonable in the context of Congress' incorporating the NSPS definition in the NSR program." The two programs are, however, distinct and separate one from another. In the words of a preeminent Clean Air Act authority, "[t]he NSPS primarily are a baseline for determining the applicable air pollution control technology for new or modified sources.... These requirements, however, are minimum requirements... [T]he NSR required for the construction or modification of major sources will usually impose a standard more stringent than NSPS. Reitze, Arnold, Air Pollution Control Law: Compliance and Enforcement, ELI 2001.